IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1297

BOBBY DEAN WINE, *Petitioner*

v.

STATE OF INDIANA, *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Petitioner was charged on July 20, 1976, with the crime of accessory before the fact to bank robbery. An amended information was filed on August 9, 1976, charging Petitioner with the same crime. Petitioner, on August 9, 1976, filed his motion for a speedy trial pursuant to Criminal Rule 4 of the Indiana Rules of Criminal Procedure. Petitioner's motion for a speedy trial was granted and his trial was set for October 5, 1976. On September 22, 1976, at a pre-trial conference, Petitioner's attorney moved that he be allowed to withdraw his appearance. The trial court allowed the withdrawal on the basis of a possible conflict of interest and appointed Stephen J. Michaels to represent the Petitioner. The trial court further found, on said date,

that the newly appointed attorney would not have sufficient time to prepare the Petitioner's defense, and *sua sponte,* reset the cause for jury trial on November 8, 1976. The trial court also noted that the later trial date was the result of the crowded condition of the trial court's calendar which would not allow an earlier resetting. The record is silent as to any objection being made by the Petitioner or his counsel at the time the trial court reset the trial date for a date subsequent to October 18, 1976, the last day allowed for trial under the seventy (70) days allowed by CR. 4 (B)(1).

On September 23, 1976, Stephen J. Michaels declined the appointment as attorney for the Petitioner, and the trial court appointed Michael E. Boonstra to represent Petitioner. Mr. Boonstra did not enter his appearance until October 19, 1976, on which date he also filed Petitioner's motion for a discharge because he had not been brought to trial within seventy (70) days as provided in CR. 4(B)(1). The trial court denied Petitioner's motion on November 1, 1976, and Petitioner was tried by jury on November 8, 1976, and was found guilty as charged.

Petitioner appealed the trial court's overruling of his motion to correct errors to the Indiana Court of Appeals which affirmed the judgment of the trial court. *Wine v. State* (1978), App., Memorandum Decision, No. 2-677-A-240, June 19, 1978. Petitioner requested a transfer to the Indiana Supreme Court which was denied on November 22, 1978.

QUESTIONS PRESENTED

1. Was the Petitioner denied his speedy trial rights as guaranteed by the Sixth Amendment to the Constitution of the United States.

2. Was the Petitioner denied his rights to a speedy trial as guaranteed by the Indiana Constitution, Article I, Section 12.

3. Was the evidence sufficient to sustain the Petitioner's conviction under applicable state law.

ARGUMENT

I.

There Was No Denial of Petitioner's Right to a Speedy Trial Under the Provisions of the Sixth Amendment to the Constitution of the United States

The Sixth Amendment to the Constitution of the United States, while guaranteeing a right to a speedy trial, does not establish a definite time period in which the trial must be held. U.S. Const. Amend. VI.

Petitioner was charged with commission of a crime by information on July 20, 1976. Petitioner's trial was held on November 8, 1976. The lapsed time between charging and trial was one hundred and eleven (111) days, less than four (4) months.

The essential ingredient of right under the Sixth Amendment to a speedy trial is orderly expedition and not mere speed. *U.S. v. Ewell,* 383 U.S. 116 (1966); *Smith v. United States,* 360 U.S. 1 (1959).

Petitioner moved for a speedy trial on August 9, 1976, and trial was set for October 5, 1976. The Petitioner's first counsel moved to withdraw on September 22, 1976, because of a possible conflict of interest. Withdrawal was allowed and the court on its own motion, after appointing new counsel, reset the trial date to November 8, 1976, to allow new counsel time to prepare for trial and because of the congestion of the trial court's calendar.

The right, under the Sixth Amendment, to a speedy trial is not infringed by discretionary continuances of the presiding judge unless such discretion is arbitrarily exercised. *State v. Stoeckle* (1969), 164 N.E.2d 303, 41 Wis.2d 378, *Cert. Denied,* 396 U.S. 10; *United States v. Tussell,* 445 F. Supp. 1 (M.D. Penn. 1977). The continuance granted by the trial court was for the benefit of the Petitioner who needed another attorney appointed to represent him. Even though there are delays in a defendant's trial, defendant is not denied a speedy trial where the delays are not unreasonable, and are for the defendant. *U.S. v. Cook,* 400 F.2d 877, 878 (4th Cir. 1968), *Cert. Denied,* 393 U.S. 1100.

Petitioner argues that the issue of the denial of his right to a speedy trial sprung from the failure, by the trial court, to adhere to Rule 4(B)(1) of the Indiana Rules of Criminal Procedure which provides that if a defendant moves for an early trial he must be tried within seventy (70) days. Such a premise does not logically stem from the adoption by a state of such a speedy trial rule. In *State v. Brewer* (1968), 436 P.2d 473, 73 Wash.2d 58, *Cert. Denied,* 393 U.S. 970, it was held that when a legislature enacts a sixty (60) day rule with respect to speedy trials, it did not conceive nor contemplate that the limitation so established should become an inflexible yardstick by which constitutional guarantees to speedy trials of felony charges would be measured. The Supreme Court of Indiana has held, in *Utterback v. State* (1974), 261 Ind. 685, 687-688, 310 N.E.2d 552, 554, in reviewing a trial date set beyond the time limit established in CR. 4(B), that:

> "The courts are under legal and moral mandate to protect the constitutional rights of accused persons, but this should not entirely relieve them from acting reasonably in their own behalf. We will vigorously enforce the right to a speedy trial, but we do not intend that accused persons should escape trial by abuse of the means we have designed for their protection."

Indiana's CR. 4(B) supplements the Sixth Amendment, but it does not fix a mandatory time parameter for the Sixth Amendment right.

Barker v. Wingo, 407 U.S. 514 (1972), established the "balancing test" of the following factors:

1. length of delay,
2. the reason for the delay,
3. the defendant's assertion of his rights, and
4. prejudice to the defendant.

However, federal courts have held that the length of the delay serves as a threshold requirement in determining violations of speedy trial rights and that where the delay is minimal it is often unnecessary to engage in further inquiry. *U.S. v. Canales,* 573 F.2d 908 (1978). In the instant case, Petitioner's trial was delayed thirty-four days from the original setting on October 5, 1976 by the resetting to November 8, 1976, and only twenty-one (21) days past the seventy (70) days allowed by Indiana's CR. 4(B)(1).

In *United States v. Wyers,* 546 F.2d 599, 602 (1977), the court had before it a twenty-one (21) day delay over the allowed ninety (90) day maximum contained in a local plan for speedy trial. The Court stated as follows:

> "At the outset, then, we must consider appellant's speedy-trial right as a constitutional matter, under the four-factor test enunciated by the Supreme Court in *Barker v. Wingo,* 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972). See, e.g., *United States v. Palmer,* 5 Cir., 1976, 537 F.2d 1287; *United States v. Shepherd,* 5 Cir., 1975, 511 F.2d 119.

> Length of delay, the first consideration, 'is to some extent a triggering mechanism' for full Wingo analysis. *Wingo, supra,* 407 U.S. at 530, 92 S.Ct. at 2192. *Unless there is a 'presumptively prejudicial' delay, the court need never consider the other factors.* Id. In this case, the delays at every stage complained of amounted only to a matter of days. They were de minimus . . . and thus were not 'presumptively prejudicial' so as to trigger our inquiry. . . . The Plan does not require dismissal for delays which are necessary, i.e., beyond the control of the court or prosecution. It is intended to expedite the processing of criminal cases—not to lay a snare for an overburdened court system." (Our Emphasis.)

Also, in *U.S. v. Kilrain,* 566 F.2d 979, 984 (5th Cir. 1978), it was stated as follows:

> "Dismissal is not required where delay is minimal and no prejudice has resulted. See *United States v. Garcia,* 5 Cir., 1977, 553 F.2d 432; *United States v. Wyers,* 5 Cir., 1977, 546 F.2d 599, 602; *United States v. Maizumi,* 5 Cir., 1976, 526 F.2d 848, 851; *United States v. Clendening,* 5 Cir., 1976, 526 F.2d 842.

The delay complained of by the Petitioner is minimal and no prejudice has been shown to have resulted from the delay. The Petitioner has not established a violation of his Sixth Amendment rights to a speedy trial.

Petitioner misstates the record on page 12 of his petition. He states:

> "In the case at bar, Petitioner's first attorney withdrew from the case prior to the trial date. *Upon withdrawal* from the case, said attorney filed with the court an affidavit stating that Petitioner was not waiving his right to a speedy trial by changing counsel and was not acquiescing in any delay." (Our Emphasis.)

The affidavit referred to by Petitioner was not filed by his first attorney "upon withdrawal". It was filed by his second attorney, on November 1, 1976 in a hearing upon Petitioners Motion to Discharge and Dismiss, more than a month after his first attorney's withdrawal. Petitioner is not shown by the record to have objected to the continuance on September 22, 1976. Under Indiana's court interpretations of CR. 4(B), such failure to object amounts to acquiescence and acquiescence amounts to waiver of discharge under said rule. *Lewis v. State* (1976), Ind., 342 N.E.2d 859; *Wickliffe v. State* (1975), Ind., 328 N.E.2d 420; *Utterback v. State* (1974), Ind., 310 N.E.2d 552; *Layton v. State* (1973), Ind., 301 N.E.2d 633; *Bryant v. State* (1973), Ind., 301 N.E.2d 179.

II.

There Was No Denial of the Right to a Speedy Trial According to Applicable State Law

The issue presented by Petitioner in this argument is that he has been denied a speedy trial under the provisions of CR. 4(B)(1) as adopted by the Indiana Supreme Court. The pertinent part of said rule provides as follows:

> "(B) Defendant in jail—Motion for early trial.
>
> (1) If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy (70) calendar days because of the congestion of the Court calendar. Provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall

file a timely motion for continuance as under subdivision (A) of this rule. . . ."

Petitioner moved for an early trial on August 9, 1976. The trial court set the trial date for October 5, 1976, well within the seventy (70) days allowed by the above rule. However, on September 22, 1976, thirteen (13) days before trial, Petitioner's appointed attorney withdrew because of a possible conflict of interest. The trial court thereupon appointed new counsel and *sua sponte* continued the trial date to November 8, 1976. The continuance was ordered to allow new counsel time to prepare for trial and was not set within the seventy-day limit allowed by CR. 4(B)(1) because of the congestion of the court's calendar. The record shows no objection by Petitioner to this continuance. The newly appointed counsel declined appointment and Petitioner's present counsel was appointed on September 23, 1976.

Present counsel did not file an appearance for Petitioner until October 19, 1976, one day after 70 day period allowed in CR. 4(B)(1), at which time he also filed Petitioner's Motion to Discharge and Dismiss. Petitioner's motion was denied after a hearing on November 1, 1976, and his trial was November 8, 1976, twenty-one (21) days following the expiration of the seventy (70) day period allowed by the rule.

The Indiana Supreme Court in interpreting its rule (CR. 4) in *Easton v. State* (1972), 258 Ind. 204, 280 N.E.2d 307, 308, stated as follows:

> "We think these propositions of the defendant to be untenable for several reasons, the least arguable of which is that while the Constitution guarantees the right to a speedy trial, it does not guarantee one within six months under all circumstances—or for

> that matter under any circumstances. The six months limitation has been prescribed by this Court as a reasonable time. *It is in no sense a constitutional guarantee and is subject to reasonable exceptions, limitations and modifications,* as we shall determine necessary to carry out its constitutional purpose." (Our Emphasis.)

The Indiana Supreme Court had before it a similar issue and fact pattern in the case of *Gross v. State* (1972), 258 Ind. 46, 278 N.E.2d 583, 584, and therein states:

> "The first question which must be answered is whether the delay which arose when new counsel was appointed by the trial court and the court continued the cause for two weeks to enable counsel to properly prepare his case was a delay caused by the appel'ant's act. Appellant's privately appointed counsel withdrew on September 2 and on September 14, the day set for trial, appellant appeared without counsel. Apparently appellant was willing to be tried without the aid of counsel but the judge correctly decided that the appellant should be represented. Art. 1, § 13 of the Constitution of Indiana guarantees a defendant the right to counsel.
>
> "The fundamental right of defendant in a criminal case to have competent counsel assist him in his defense carries with it as a necessary corollary the right that such counsel shall have adequate time in which to prepare the defense." *Sweet v. State* (1954), 233 Ind. 160, 164, 117 N.E.2d 745, 746.
>
> The actions of appellant in arriving in court without counsel after his privately retained attorney withdrew precipitated the delay. Although possibly willing to proceed without counsel, appellant acquiesced in the appointment of counsel and in the continuance for preparation time. The delay was clearly for appellant's benefit and intended to insure him his constitutional rights. Since the delay

was precipitated by appellant's own actions and was for his benefit, the delay is chargeable to the appellant."

In *Utterback v. State, supra,* at page 554, the court stated:

> "The purpose of the rules is to assure early trials and not to discharge defendants. The material difference between the rules is that under the one the time starts running automatically, while under the other the defendant must trigger it with a motion. In either event, when a ruling is made that is incorrect, and the offended party is aware of it, or reasonably should be presumed to be aware of it, it is his obligation to call it to the court's attention in time to permit a correction. If he fails to do so, he should not be heard to complain. The courts are under legal and moral mandate to protect the constitutional rights of accused persons, but this should not entirely relieve them from acting reasonably in their own behalf. We will vigorously enforce the right to a speedy trial, but we do not intend that accused persons should escape trial by abuse of the means that we have designed for their protection."

The foregoing case citations are interpretations by Indiana's highest appellate court of its CR. 4.

This Court in *Garner v. State of Louisiana,* 368 U.S. 157, 166 (1961), has stated:

> "We of course are bound by a State's interpretation of its own statute and will not substitute our judgment for that of the State's when it becomes necessary to analyze the evidence for the purpose of determining whether that evidence supports the finding of a state court."

In the instant case the Indiana Court of Appeals has reviewed Indiana case law in relation to alleged errors in

Petitioner's trial at the lower court level and has found that under the facts and the provisions of CR. 4(B)(1) Petitioner had acquiesced in the setting of his trial beyond the seventy (70) day limit. The Indiana Supreme Court in denying transfer has accepted the Court of Appeals interpretation of existing Indiana law.

The Respondent has established under Argument I, that the bringing of Petitioner to trial in less than four (4) months, from date that he was first charged, was not a violation of Petitioner's speedy trial rights under the provisions of the Sixth Amendment to the Constitution of the United States. The failure to bring Petitioner to trial within the seventy (70) day provision of Indiana's CR. 4, presents no other substantial federal question for review by this Court.

III.

Evidence Introduced by the State Was Sufficient to Sustain a Conviction According to Applicable State Law

This issue as argued by Petitioner raises no substantial federal question. Petitioner argues that the evidence was insufficient under *applicable state law,* not that the evidence submitted violates or deprives him of some right or immunity from the Constitution of the United States.

In *Gibson v. Mississippi,* 162 U.S. 565, 591 (1895), this Court stated:

> "The conduct of a criminal trial in a state court cannot be reviewed by this court unless the trial is had under some statute repugnant to the Constitution of the United States, or was so conducted as to deprive the accused of some right or immunity secured to him by that instrument. Mere error in administering the criminal law of a state or in the

> conduct of a criminal trial—no Federal right being invaded or denied—is beyond the revisory power of this court under the statutes regulating its jurisdiction."

Indiana's Court of Appeals has held that the evidence was sufficient under applicable state law to support Petitioner's conviction. *Wine v. State, supra.*

CONCLUSION

For the foregoing reasons, the Respondent, State of Indiana, respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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